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August 18, 1997

VIA COURIER

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

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AUG 18 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**Re: Hyperion Telecommunications, Inc.'s Petition Requesting Forbearance
(CCB/CPD No. 96-3, CCB/CPD No. 96-7, CC Docket No. 97-146)**

Dear Mr. Caton:

On behalf of RCN Telecom Services, Inc., enclosed are an original and 12 copies of its Comments in response to the Commission's June 19, 1997 Notice of Proposed Rulemaking in the above proceeding.

Also enclosed is an extra copy of this filing. Please date stamp the extra copy and return it to the undersigned via my courier.

If you should have any questions, please do not hesitate to contact me.

Very truly yours,


Morton J. Posner

Counsel for RCN Telecom Services, Inc.

Enclosures

cc(w/encl.): Service List
Competitive Pricing Division (2 copies)
ITS
Scott Burnside
Joseph Kahl

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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AUG 18 1997

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In the Matters of)	
)	
Hyperion Telecommunications, Inc.)	CCB/CPD No. 96-3
Petition Requesting Forbearance)	
)	
Time Warner Communications)	CCB/CPD No. 96-7
Petition for Forbearance)	
)	
Complete Detariffing for)	CC Docket No. 97-146
Competitive Access Providers and)	
Competitive Local Exchange Carriers)	

COMMENTS OF RCN TELECOM SERVICES, INC.

RCN Telecom Services, Inc. ("RCN"), by counsel, hereby files its Comments in response to the Commission's June 19, 1997 *Memorandum Opinion and Order and Notice of Proposed Rulemaking* ("NPRM") in the captioned proceedings.^{1/} The Commission considers in this comment cycle whether to expand its June 19 Order instituting permissive detariffing of competitive access provider ("CAP") services to a complete ban on tariffing those services. The Communications Act of 1934, as amended, does not grant the Commission the authority to order mandatory detariffing,

^{1/} RCN's affiliate, RCN Long Distance Company (formerly Commonwealth Long Distance Company), has been a long distance service provider since 1992. Affiliates of RCN are authorized to provide local exchange service in Massachusetts, New York and Pennsylvania, and have applications for such authority pending in Connecticut, Delaware, the District of Columbia, Maryland, New Hampshire and Virginia. RCN is a reseller of local exchange services in the service areas of NYNEX (in New York and Massachusetts) and Bell Atlantic (in Pennsylvania). RCN is also a facilities-based local exchange carrier in Massachusetts and plans to implement facilities-based service in New York and Pennsylvania in the near future.

nor is such a policy in the public interest. RCN urges the Commission not to disturb its June 19 ruling ordering permissive detariffing by compelling CAPs to withdraw their tariffs.

I. THE COMMUNICATIONS ACT DOES NOT AUTHORIZE COMPLETE FORBEARANCE FROM STATUTORY REQUIREMENTS

Section 10(a) of the Communications Act of 1934, 47 U.S.C. § 160(a),^{2/} provides that the Commission “shall forbear from applying any regulation or any provision of [the Communications Act]” if a public interest showing is met.^{3/} The term “forbearance” is not defined in the statute, however, the dictionary definition of forbearance is “refraining from doing something that one has a legal right to do.”^{4/} Section 203 of the Act compels common carriers to file tariffs. While Section 10(a) authorizes the Commission to forbear enforcement of Section 203 — that is, to refrain from requiring carriers to comply with that section — the Commission is without statutory authority to prohibit voluntary compliance with tariffing requirements. As will be discussed below, tariff filings provide benefits to CAPs and Section 203 provides CAPs with the legal right to file tariffs.

^{2/} Section 10 was added to the Communications Act by the Telecommunications Act of 1996.

^{3/} Specifically, the Commission’s Section 10(a) public interest inquiry considers whether:

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications or regulations by, for, or in conjunction with that telecommunications carrier or telecommunications service are just and reasonable, and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.

^{4/} Black’s Law Dictionary at 644 (1990).

Commission adoption of a mandatory detariffing policy would have the effect of permanently repealing Section 203, at least as that section applies to CAPs. Under the principle of separation of powers, unless Congress explicitly vests the Commission with authority to ignore statutory provisions outright, the Commission may not repeal legislative enactments.

The Commission's efforts to institute mandatory detariffing for nondominant interexchange carriers ("IXCs") in 1985 and 1992 were reversed by the U.S. Court of Appeals for the D.C. Circuit and the Supreme Court on the ground that the Commission lacked authority to prohibit tariff filings.^{5/} As the D.C. Circuit has stated, mandatory detariffing goes "beyond mere forbearance."^{6/} Since the Commission's earlier efforts to institute mandatory detariffing, Congress granted the Commission the forbearance authority found in Section 10(a), which the FCC did not have before. Section 10(a) only empowers the Commission to forbear from enforcing provisions of the Act, not to eliminate them outright. As the Commission acknowledged in the NPRM, the D.C. Circuit has granted a stay pending appeal on the merits of the Commission's latest order adopting mandatory detariffing for IXCs.^{7/} The stay was sought on the basis that the Commission has no statutory authority to eliminate tariffs. A stay may only be granted when there is a likelihood of relief on the merits.^{8/} Given the fact that the D.C. Circuit has already indicated a likelihood that the Commission does not have the

^{5/} NPRM, ¶ 3

^{6/} *American Tel. & Tel. Co. v. FCC*, 978 F.2d 727, 729 (1992), *cert. denied*, 509 U.S. 913 (1993).

^{7/} NPRM, ¶ 30; *see Second Report and Order, Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61 (Oct. 31, 1996), *stay pending appeal granted*, *MCI Telecommunications Corp. v. FCC*, No. 96-1459 (D.C. Cir. Feb. 13, 1997).

^{8/} *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

authority to eliminate tariffing requirements, it would be premature for the Commission to rule on the merits of mandatory detariffing for CAPs until the appeal in the IXC case is decided.

II. MANDATORY DETARIFFING IS NOT IN THE PUBLIC INTEREST

In the NPRM, the Commission ruled that permissive detariffing provided a number of public interest benefits: reduction of transaction costs for providers; reduction of administrative burdens for service providers; permitting rapid response to market conditions through elimination of costs on carriers that attempt to make new offerings; and facilitating entry by new providers.^{9/} RCN agrees that these public interest benefits favor permissive detariffing. The Commission tentatively concludes in the NPRM, however, that mandatory detariffing is preferable to permissive detariffing because it would preclude use of the filed rate doctrine to nullify contractual arrangements, eliminate price signaling, and reduce the Commission's own administrative burdens.^{10/} Certainly, no one can quarrel with the fact that mandatory detariffing would reduce the strain on the Commission's administrative resources, but that is not one of the statutory criteria for forbearance under Section 10(a). The Commission's two other conclusions do not support eliminating CAP tariffs, however.

CAPs can provide both special and switched access. Special access service includes the provisioning of dedicated lines or local telecommunications services to customers. Special access virtually always is provided either to large business customers who execute individual service contracts with a CAP, or to IXCs. Both are larger, sophisticated purchasers of access service. CAPs offer this service in direct competition with incumbent local exchange carriers ("ILECs")

^{9/} NPRM, ¶ 34.

^{10/} *Id.*

who dominate the market as a whole. Thus, both customer groups using CAP services have competitive alternatives available and have the ability to protect their own interests in negotiating with a CAP. Similarly, virtually the only users of switched access services are IXC's.

In this highly competitive marketplace, the Commission's fears of possible abuse of permissive tariffing are unrealistic. Non-dominant CAPs do not possess market power that could allow them to engage in monopoly or anticompetitive pricing of access services, or price signaling. In order to attract or retain customers, CAPs must offer comparable (or better) access services which match or beat the incumbent's prices. The high degree of competition faced by CAPs means they must honor their contractual arrangements and cannot use tariffs as a means to nullify those arrangements.

Mandatory detariffing would not be in the public interest for several reasons. In the absence of tariffs, the introduction of varied services and price changes might have to be renegotiated with all customers. Thus, a potential public interest benefit of the ability to rapidly institute new service offerings by tariff would be lost. Tariffs offer a substantial savings in transaction costs because individual service contracts, particularly with IXC's, are complex arrangements some of which may be accomplished more efficiently through use of tariffs. Moreover, if CAPs were required to cancel their tariffs, those individual customer service contracts which rely upon tariff language would be eviscerated. There would be uncertainty about what terms and prices govern service without the referenced tariffs, and the possibility that CAPs would be unable to collect from customers as a result.

III. CONCLUSION

The Commission has already correctly identified the benefits associated with permissive detariffing. It does not follow, however, that the complete elimination of tariffs offers even more benefit. To the contrary, not only is the Commission without authority to institute mandatory detariffing, but such a policy would take away many of the benefits the public will enjoy through permissive detariffing. For all the above reasons, RCN respectfully suggests that the Commission should not adopt its proposal to require CAPs to withdraw their tariffs.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'R. Blau', is written over a horizontal line.

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Dated: August 18, 1997

CERTIFICATE OF SERVICE


I, Alma Myers, hereby certify that on this 18th day of August, 1997, a copy of the foregoing Comments of RNC Telecom Services, Inc. was served via courier on the following:

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And a copy was served via first class, postage-prepaid mail on the individuals on the attached list.


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